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Supreme Court of the United States

October Term, 1973

No. 73-557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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Statement

This *Amicus Curiae* brief is submitted on behalf of the Association of American Publishers, Inc. (hereinafter referred to as the "AAP") pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of Appellant. Counsel for both Appellant and Appellee have granted written consent for the filing of this brief.[1]

1. Filed herewith is a letter dated January 14, 1974 from Tench C. Coxe, Esq., counsel for appellant, specifically granting such request. Also filed is a copy of a letter from Carter Goode, Esq., counsel for appellee, addressed to the Clerk of this Court granting general consent for all such *amicus* briefs. The AAP understands that the orginal of this letter is on file in the Clerk's office and relies thereon. In the event such letter is not sufficient consent, the AAP respectfully requests the Court to deem the following Section hereof entitld "Interest of the *Amicus*" as a motion for leave to file this *amicus* brief.

Interest of the *Amicus*

The AAP is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious book publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. These works are distributed in thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

This Court has not sustained any obscenity conviction of any member of the AAP since 1948 when an equally divided Court affirmed a conviction for the sale of *Memoirs of Hecate County,* written by Edmund Wilson and published by Doubleday & Co., Inc. a member of the AAP.[2] Notwithstanding this record, members of the AAP are directly and significantly affected by the decisions of this Court in obscenity cases and by the ensuing legislative, judicial and prosecutorial actions which flow from those decisions. As the 1948 conviction involving Edmund Wilson's important and acclaimed work indicates, the "obscenity problem"[3] has long afflicted members of the AAP. Yet, since June 21, 1973 when this Court handed down its decision in *Miller* v. *California,* —— U.S. ——, 93 S.Ct.

2. *Doubleday & Co., Inc.* v. *New York,* 335 U.S. 848 (1948).

3. As used herein the phrase "obscenity problem" refers not only to the alleged proliferation of obscene or pornographic materials but to the detriments to protected expression flowing from efforts to curb pornography.

2607 (1973) and its companion cases, the "obscenity problem" has assumed greater magnitude for the members of the AAP and, indeed, for all those involved in disseminating ideas and information to the American public at large.

Hence, although the instant appeal involves the medium of motion pictures and not books and although the conviction is against an exhibitor and not a publisher, the issues involved herein are identical for all. While no member of the AAP has at any time been involved with the creation, production, distribution or exhibition of the film "Carnal Knowledge" the decision by this Court on this appeal will directly affect AAP's member publishers. As the conviction of Billy Jenkins amply demonstrates, judicial decisions and legislative enactments with respect to obscenity are not limited in their effects on the panderers of "hard core" pornography. And the AAP believes that this Court only intended to provide guidelines for isolating "hard core" pornography. Indeed, in *Miller* the majority of this Court by the Chief Justice stated:

> "[Today] a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." (93 S. Ct. 2607, 2617)

It was further stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (*id.* at 2616)

Notwithstanding this clearly expressed intention, the conviction of Billy Jenkins for exhibiting the widely ac-

claimed film "Carnal Knowledge" illustrates that a limited intention does not necessarily result in a limited effect.

In the June decisions, all of the justices of this Court acknowledged that the then-existing guidelines for defining obscenity had failed. Based on experience since June 1973, the AAP submits that the guidelines in *Miller* and its companion cases also have failed. Much "hard core" pornography continues to thrive while many works, traditionally afforded First Amendment protection, have fallen prey to the heavy hand of censorship.[4] This failure to achieve the intended goals results not from an unworkable definition *per se*, but from the inherent impossibility of devising any definition.[5]

Although the AAP joined with others in a brief *amici curiae* in support of Appellant's Jurisdiction Statement herein[6] urging the Court to clarify certain aspects of the *Miller* guidelines (the misinterpretations of which led to the decision of the court below), it now respectfully requests the Court to consider all aspects of the "obscenity problem" in hearing this appeal. The AAP urges the Court to fashion a new approach to the "obscenity problem" and it files this brief as a friend of the Court with the intention of assisting the Court in analyzing the problems and suggesting the solutions.

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4. The failure of the *Miller* guidelines to carve out "hard core" pornography and to protect other expression is discussed at length in The New York Times, December 9, 1973 §2 (Arts and Leisure) in *What Has the Court Saved Us From?* at 3 and *And What About the Peeps* at 15.

5. See *Paris Adult Theatre I* v. *Slaton*, —— U.S. ——, 93 S.Ct. 2628, 2642-2663 (1973) (Brennan, J. dissenting).

6. Leave to file such joint *amici* brief was granted on December 10, 1973.

ARGUMENT

POINT I

There is no basis nor reason for holding that "obscene" material is outside the ambit of First Amendment protection.

The AAP readily acknowledges that the First Amendment has never been treated as an absolute.[7] It does not disagree with limitations on expression in any number of circumstances—the malicious cry of "fire" in a crowded theatre being but one example. Other examples are plentiful. As set forth in the majority opinion in *Paris Adult Theatre*, 93 S.Ct. at 2637, the absolute rights of free expression and assembly have been curtailed legitimately by antitrust, security and other regulatory laws, both federal and state. But these limitations are directed toward commercial transactions involving fraud and misrepresentation which result in demonstrable harm to others.

Until the decisions in *Miller* and *Paris Adult Theatre*, this Court did not even suggest that obscene expression may be proscribed because of some harm it may create. Indeed, notwithstanding the Court's emphasis on "the quality of life," "total community environment" and "tone of commerce" in *Paris Adult Theatre*,[8] the decisions last June were squarely based on the holding in *Roth* v. *United States*[9] that "obscenity is not within the area of constitutionally protected speech."[10]

7. *Miller* at 2614 citing *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951).

8. 93 S.Ct. at 2635.

9. 354 U.S. 476, 484-485 (1957).

10. *Miller*, 93 S.Ct. at 2613.

The AAP believes that there is no basis for dealing with the "obscenity problem" from this posture. Although not controlling, it appears clear that the history of the First Amendment does not afford the basis for the obscenity exception.[11] No federal obscenity statute of any kind was enacted until 1842,[12] many decades after the adoption of the First Amendment. As far as the colonies were concerned, only Massachusetts had a law that was potentially applicable to sexual material, although it was directed toward blasphemy.[13] And no known prosecutions under it occurred until 1821.[14] Only towards the end of the nineteenth century with Anthony Comstock's formation of the Committee for the Suppression of Vice did obscenity become an issue in this country.[15]

Just as there is no historical basis for treating obscenity as outside the First Amendment, there is no reason to do so. Every other limitation on freedom of expression is based on a determination that, absent some restriction, demonstrable harm will result. As this balancing test has been used to place aspects of commercial regulation above speech, mentioned above, it has been used to curtail political speech which presents a "clear and present danger"[16] and it has been used to penalize libelous speech which directly harms the target of such speech. Although the test for determining

11. For a full summary of early history of the treatment of obscenity see The Report of the Commission on Obscenity and Pornography (Random House 1970) Part Three, §IV A at 348-354.

12. 5 Stat. 566.

13. Province Laws 1711-12, ch. 6, §19 (1662).

14. *Commonwealth* v. *Holmes,* 17 Mass. 336.

15. Commission Report at 353.

16. See, *e.g., Dennis* v. *United States,* 341 U.S. 494 (1951).

whether speech is protected varies with the circumstances, each of these tests is rooted in the premise that regulation is justified only because of the dangerous consequences of the speech—the speech itself is not the evil.[17]

Only obscenity is treated differently. And that different treatment began recently with this Court's decision in *Roth*. Prior to 1957 some judges applied the traditional First Amendment terms to sexually explicit materials reasoning that general prohibitions were invalid absent a finding that such materials create a danger.[18] Although the Court set forth reasons in *Roth* for holding that it was not necessary to apply the traditional First Amendment tests to obscenity—it being outside the First Amendment—commentators have suggested that the exclusion solution was followed in *Roth* because of the absence of any evidence of the consequences of such speech.[19]

Now, however, evidence on the consequences of obscenity has been marshaled and analyzed in the Report of the Commission on Obscenity and Pornography. There is no longer any justification to deal with obscenity on a theoretical basis. Although the AAP is, with all due respect, rather shocked that the Court failed in *Miller* and its companion cases to heed or acknowledge the findings of the Commission it notes with a mixed reaction that the Court

17. *The Supreme Court*, 1972 Term, 87 Harv. L. Rev. 1, 162 n. 19.

18. See, *e.g.*, *United States* v. *Roth*, 273 F. 2d 796, 812-817 (2d Cir. 1956) (Frank, J. concurring).

19. See *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 1, 162 n. 19, citing Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 9-12 and Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L.J. 127, 130-131 (1966).

in *Paris Adult Theatre* did go beyond the pure exclusion theory in holding the states justified in prohibiting "hard core" pornographic materials because of countervailing interests.[20]

The AAP urges the Court to abandon the exclusion theory entirely and, instead, to deal with obscene speech in the same fashion it deals with all other speech which, because of the circumstances of its publication or use, may be properly regulated under traditional First Amendment considerations.

POINT II

Traditional First Amendment considerations militate against allowing the prohibition of any sexually-oriented speech.

A. Reasons advanced for prohibiting sexually-oriented speech must be evaluated.

Regarding obscenity in traditional First Amendment terms means balancing all interests and concerns, with a strong presumption in favor of free expression. The AAP respectfully submits that any such balancing must take into consideration the findings of the President's Commission. One of the four tasks assigned by Congress in establishing the Commission (P.L. 90-100) was "to study the effect of obscenity and pornography on the public, and particularly minors, and its relationship to crime and other antisocial behavior." While the AAP does not suggest that the Court is bound by the conclusions of the Commission, it is at a loss to understand why the Court has completely

20. 93 S. Ct. at 2635.

ignored the extensive research conducted by this group of distinguished and disinterested persons. Even those members of the Commission who dissented from the recommendations of the Commission, and on whom this Court has seen fit to rely, concurred in the basic Commission finding that: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults."[21]

Although this Court inexplicably ignored the Commission's Report in its decisions of June 1973, the Court in *Stanley* v. *Georgia*, 394 U.S. 557, 566-567 (1969), a year before issuance of the Report, presaged the findings. There the Court acknowledged that "[t]here appears to be little empirical basis for [the assertion] that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." Accordingly, the Court there found that "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."

Without citing any new evidence, this Court, four years after *Stanley* and three years after issuance of the Commission's Report, sought to bolster its holding in *Paris Adult Theatre* by alluding to an "arguable correlation between obscene material and crime" which the Court believed was

21. Commission's Report at 169.

indicated in the dissenting statement of commissioners Hill and Link.[22] Yet the Hill-Link statement disavowed the need to determine the existence of any such cause-effect relationship between obscenity and crime. Instead, their expressed concern was with "public morality" and "attitudes.[23] The Court's discussion in *Paris Adult Theatre* on the interest of the states in the "quality of life" etc. does, *Amicus* suspects, most accurately reflect what the Court was, in fact, putting on the scale opposite the heavy First Amendment presumption afforded to all speech.

B. The reasons advanced for prohibiting sexually-oriented speech are not sufficiently compelling to justify intrusions on other speech.

The AAP is in no position and makes no attempt to argue the merits of those allegedly legitimate interests. For the sake of argument, *Amicus* will concede that the states do have such interests in "the quality of life," "the total community environment" and the "tone of commerce." But the AAP submits that such interests cannot realistically be pitted solely against the right to commercially disseminate "hard core" pornography. In view of the number of obscenity convictions reversed by this Court over the years,[24] the AAP believes the Court can take judicial notice of the fact that prohibitions aimed solely at obscenity catch a great deal of other—and protected—material in their net.

22. 93 S. Ct. at 2635.

23. Commission's Report at 458.

24. No fewer than 31 cases were reversed with reference to *Redrup* v. *New York*, 386 U.S. 767 (1967) alone. These are cited by Brennan, J. at 93 S.Ct. 2647, n. 8.

Indeed, works which are devoid of any negligible quantum of explicit sexual content have been attacked on the alleged authority of obscenity prohibitions. In cases involving the publication of underground and campus newspapers and the use of certain materials in the classroom, the underlying objections of the forces of censorship are the controversial social or political contents of such works.[25]

This misdirected use of obscenity legislation existed long before the decisions of last June, but the AAP regretfully notes that this aspect of the "obscenity problem" was not cured by the decisions of last June—notwithstanding the Court's intention to limit prohibitions to "hard core" pornography. For example:

In November 1973, all known copies of Kurt Vonnegut's novel *Slaughterhouse Five* were burned in Drake, North Dakota and next on the list to be destroyed by orders of the local schoolboard were *Deliverance* by James Dickey and an anthology of short stories by Ernest Hemingway, William Faulkner and John Steinbeck.[26]

In September 1973, pages were removed from Edgar Lee Masters' *Spoon River Anthology* prior to use by stu-

25. See, *e.g.*, *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Papish* v. *University of Missouri Board of Curators*, —— U.S. ——, 93 S.Ct. 1197 (1973); *Washington Free Community* v. *State's Attorney*, 300 F. Supp. 487 (D. Md. 1969); and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

26. The New York Times, Nov. 11, 1973 and Nov. 16, 1973. Similarly, a school teacher in McBee, South Carolina, has been charged with an obscenity offense for assigning *Slaughterhouse Five*. Dunn, N.C., Record, October 29, 1973.

dents because they contained the words "harlot", "bare breast", "free love" and "lesbian".[27]

Also last fall, Claude Brown's *Manchild in the Promised Land* was banned from school libraries by the Baltimore School Board. When questioned one of the proponents of the ban said of the book which describes growing up in Harlem: "Why does he [the author] have to tell it like it is? Why can't he tell it like it should be?"[28] And in Orem, Utah a bookseller was charged with selling *A Clockwork Orange* by Anthony Burgess.[29]

The above examples, which involve books published by members of the AAP, and many similar instances not enumerated, do not derive solely from the difficulty inherent in drawing the line to separate "hard core" pornography from protected speech. The definitional problem arises with material in the grey area—that which is not clearly on either side of the line dividing protected from unprotected speech. The examples discussed above are not grey materials; in most cases, these are prized classics of American literature. They are attacked because they are unpleasant, disturbing or controversial. In short, they represent the very type of expression which the First Amendment was adopted to protect.[30]

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27. The New York Times, September 26, 1973 at 39.

28. The New York Times, December 9, 1973.

29. Pace, *Fears of Local Censorship Haunt the Book Trade*, The New York Times, January 7, 1974.

30. "The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfactions with conditions the way they are,' and even to stir 'people to anger.' *Terminiello* v. *Chicago*, 337 U.S. 1, 4 * * *." (*Miller* at 2626, Douglas, J. dissenting.)

The AAP respectfully submits that, in applying the traditional First Amendment test to expression with sexual content, the Court must consider the two distinct sides of the "obscenity problem": One side is, of course, whether the reasons advanced for prohibiting certain sexually-explicit materials are sufficiently substantiated by the available evidence. This cannot be done without some consideration of the Commission's Report. The other side is, *Amicus* believes, equally clear. Are the reasons, assuming they exist, to allow the restriction of "hard core" pornography sufficiently compelling to tolerate the inevitable censorship of many works which cannot be deemed obscene under any constitutional definition? The AAP submits they are not and urges the Court to so hold.

POINT III

The problems created by *Miller* demonstrate that a different approach to the "obscenity problem" is required.

Even if the Court determines, after consideration of the arguments advanced in Points I and II above, on whatever rationale, that the states and the federal government may proscribe "hard core" pornography, the Court is next faced with the apparently impossible task of articulating a definition of such material. For all of the reasons set forth in Mr. Justice Brennan's dissenting opinion in *Paris Adult Theatre*,[31] the AAP believes that all prior and existing definitions are void-for-vagueness.

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31. 93 S.Ct. at 2642-2663.

A. *Miller* has exacerbated the "obscenity problem".

Although Mr. Justice Brennan could only speculate as to the consequences of the new test set forth in *Miller*, experience since last June demonstrates the accuracy of such speculation. Instead of curing or even improving "the intractable obscenity problem"[32] the test developed last June has made it worse. The conflicting reactions by the nation's judiciary as to how to determine the constitutionality of pre-*Miller* statutes is but one indication of the confusion *Miller* has generated. Just since the time the Court noted probable jurisdiction in the instant case, the highest courts of New York and Louisiana have come out on opposite sides of the same question—*i.e.*, whether their respective state statutes are constitutional in light of their failure to specifically define "sexual conduct".[33]

The confusion over the need to specifically define sexual conduct as well as other ambiguities in *Miller* were discussed by Judge Harold Leventhal of the United States Circuit Court of Appeals for the District of Columbia Circuit in an article in the American Bar Association Journal last November.[34] Among the questions noted by Judge Leventhal is "whether the community can be more local than a state—a county, or a city, or a metropolitan area—

32. *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J. concurring and dissenting).

33. *People* v. *Heller*, —— U.S. ——, 93 S.Ct. 2789, *on remand* —— N.Y.2d ——; *Louisiana* v. *Shreveport News Agency, Inc.*, —— La. ——, 42 U.S.L.W. 2344 (Dec. 3, 1973). See also examples of similar conflicting judicial interpretations of *Miller* set forth in notes 6, 7 and 10 in the brief *amici curiae* in which the AAP joined with others in support of Appellant's Jurisdictional Statement, that brief is referred to above in "Interest of the *Amicus*."

34. 59 A.B.A.J. 1261-1266 (Nov. 1973).

and, if so, under what circumstances." He also wonders whether "the four categories included in the L.A.P.S. [literary, artistic, political, scientific] test constitute an exhaustive catalogue? * * * What for example, about a serious sex education book?" And citing *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), he goes on to *presume* that "the Court's reference to 'serious' L.A.P.S. values does not outlaw the comic side of literary or artistic expression."

These and similar questions as to the meaning and proper application of *Miller* are not simply academic concerns. They have arisen regularly since last June in towns throughout the United States. Below are just a sample of the myriad of instances in which mischievous assaults on First Amendment rights have been perpetrated under the banner of *Miller*:

In Longwood, Florida, Police Chief Dowell announced that the time had come to enforce a 1968 criminal ordinance prohibiting the sale or exhibition of any "pornographic" material. He defined obscenity as "Anything obscene humanly speaking, is also obscene in a book." To elaborate he gave the example of a picture of a woman "in the state of undress" since a woman would be arrested if she appeared that way in public.[35] Absurd as this statement of the test may seem at first glance, it is identical in approach to the definition of obscenity used to convict Billy Jenkins under Georgia Code Ann. §26-2105 as combined with §26-2011.

In New Baltimore, Michigan, an ordinance was adopted on October 23, 1973 which, in its specific definitions was so

35. Sanford, Fla. Herald, August 14, 1973 and Longwood, Fla. Citizens News, August 23, 1973.

encompassing that the Police Chief said that "even baby powder advertisements depicting naked infants are illegal".[36] Regardless of whether prosecutions are commenced under such an ordinance, its adoption, with the attendant publicity, inevitably results in the withdrawal from sale of materials which are never judicially challenged or tested.

Similar threat or harassment campaigns have even been initiated by local judges. In Nelson County, Kentucky, Judge James A. Sutherland announced that the local citizens "don't condone" and "won't tolerate" magazines such as *Playboy*. Sutherland stated "I think I can speak for the vast majority of the people of this county • • • Now the word has gotten out and I believe the people who were offering such literature for sale have ceased. They said they would not have it on their shelves were it not for a certain demand."[37] As is clear, this self-proclaimed censor—without the assistance of a judicial proceeding—has eliminated a whole category of reading material which, he admits, was sought out by members of the community.

In other communities, letters have been sent to the distributors of reading materials by local officials setting forth their interpretations of state laws and Supreme Court rulings and requesting that certain materials be removed from sale. One such letter, from the Mayor of the City of Shelbyville, Kentucky, is reproduced as an appendix hereto. In another community, Oklahoma City, an assistant District Attorney changed his litigation tactic so as to preclude the publishers of threatened publications from intervening to defend the materials. In so doing, he said

36. The Detroit Free Press, November 6, 1973.

37. Louisville, Ky. Courrier Journal, September 29, 1973.

"We don't want a court adjudication on obscenity * * * We don't need such an interpretation, we've accomplished our purpose by cleaning up 35 newsstands."[38]

B. Only regulation of the circumstances of distribution should be allowed and such regulation should be by civil proceeding.

The AAP hopes that on the basis of the few examples given, the Court will take judicial notice of the pervasive mischief occasioned by its decision last June. While the AAP finds the instances of abuse profusive, it acknowledges that the solutions are far less abundant. It has concluded that the only realistic and workable solution is that set forth in the *Paris Adult Theatre* dissent by Mr. Justice Brennan. In short, the only way to avoid the inherent difficulties surrounding the *Miller* approach to the "obscenity problem" is to allow the dissemination of all sexually-oriented materials to willing adults in those circumstances that do not force such materials on unwillng adults and that do not expose them to unemancipated and unmarried minors.

Only such an approach will sidestep the morass of problems caused by the most recent attempt in *Miller*, as well as earlier ones, to separate out obscene materials in order to suppress them. This solution is by no means radical. Indeed, the solid constitutional foundation for allowing adults to see and read what they choose was fully

38. Oklahoma Journal, June 16, 1973. Although this occurred prior to *Miller* "cleaning up" the *bookstores* in Oklahoma City was swiftly accomplished after *Miller*. On the basis of two complaints, the police—by pressure alone—caused the removal from sale of the best-selling book, *The Joy of Sex*. See, Oklahoma Journal, December 15, 1972.

established in *Stanley* v. *Georgia*. While the Court may prefer to interpret *Stanley* as holding only that "a man's home is his castle," there is little question that *Stanley* was primarily a First Amendment case. Why else would the Court have noted that: "It is now well established that the Constitution protects the right to receive information and ideas" or that it is not relevant that "obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content" and that "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all"?[39]

In *Miller*[40] the majority rejected the solution suggested here and by Mr. Justice Brennan because (1) the avowed difficulty of line drawing to determine what materials are subject to any regulation still exists and (2) the Constitution does not authorize a distinction between willing "adults" and willing "juveniles." As to the latter, it is clear beyond peradventure that *Ginsberg* v. *New York*, 390 U.S. 629 (1968) has already found or assumed such authority. The AAP admits that the former problem raised has not yet been resolved. But even there, the Court, itself, has acknowledged the existence of a workable solution. In its decision in *Paris Adult Theatre*, the Court noted with approval the civil procedure used by Georgia to judicially determine whether the films involved were unprotected before charging any one with a criminal offense for their exhibition.[41]

39. 394 U.S. at 564, 566.

40. 93 S.Ct. at 2616.

41. 93 S.Ct. at 2634.

If such a prior civil determination were required prior to instituting criminal proceedings, the inability to draw precise lines would present less of a problem. Publishers, distributors, librarians and others would no longer be subjected to the opprobrium of criminal charges and the harshness of criminal fines if they fail to make the same preliminary determination as the local prosecutor, judge or jury. What is inevitably vague would at least be definite before some one is faced with a criminal record.

A constitutionally-mandated prior civil determination would solve the void-for-vagueness and due process infirmities inherent in the present approach. It is the obvious procedural device to satisfy the fundamental requirement that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[42]

Unless a prior civil proceeding is combined with a constitutional directive that consenting adults should have access to any sexually-oriented expression they choose, however, the First Amendment will remain emasculated. Even a civil injunction or declaratory judgment proceeding can be embarrassing and costly. To avoid such proceedings publishers and other disseminators will continue to steer further from the dividing line than necessary unless they are assured that the works they handle are not contraband which cannot be sold under any circumstances. Absolute prohibitions will still have a chilling effect on protected materials and "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas

42. *United States* v. *Harris*, 347 U.S. 612, 617 (1954).

and expressions'"[43] will be infringed. If a mandatory prior civil determination were combined with carefully drawn restrictions on the circumstances of distribution, however, the right of consenting adults to access would be protected. Moreover, such regulations on the circumstances of distribution would, the AAP believes, allow the states to take effective steps to keep sexually-oriented materials from minors and offended adults. This proposed solution would allow the states to control matters of legitimate interest to them and it would restore our sorely battered First Amendment to its place as "the matrix"[44] of every other form of freedom our American system jealously cherishes and proudly provides.

Conclusion

In view of the foregoing, the Association of American Publishers, Inc. respectfully urges the Court to reverse the decision below and, in so doing, to consider and adopt the suggestions offered herein.

Respectfully submitted,

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43. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969).

44. *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.).

CITY OF SHELBYVILLE

Founded 1792
Shelbyville, Kentucky 40065

1 October, 1973

W. B. PORTER
Mayor
CHESTER MATHES JR.
City Attorney
JOE L. PUCKETT
Vice-Director
JOHN G. FERNANDES
Treasurer
H. H. NEWTON
Assessor
HOWARD FLOOD
Fire Administrator
FRED BOND
Police Judge

E. BELCHER
Police Chief
ELMER HAWKINS
Housing Inspector
FLOYD WILLARD
Fire Chief
ERNEST HAWKINS
City Engineer
Construction
FORREST HECKLEY
HOWARD FLOOD
JAMES HARDIN
RAY HARDESTY
HARRY LONG
LEE NOR MACK

TO ALL DISTRIBUTORS OF READING MATERIALS:

In compliance with K.R.S.436.100 and the U.S. Supreme Courts Decision on obscene literature (Pornography), Shelbyville City Council, in regular session, 5 July, 1973, voted unanimously to instruct the City Attorney and Chief of Police to take what action necessary to rid the City of publications that are not in keeping with the culture and religious climate of this community.

The standards of this Community does not permit nudity, profanity, or obscenity publically or in print. Many complaints, meetings, and discussions have taken place regarding the sale of printed publications considered obscene. This Community considers photo's or drawings of nudes, written sex stories, and profanity obscene. Some of the publications noted are: Playboy, Oui, Penthouse, Gallery, Cavalier, and others.

The City does not desire to make headlines, if it can be averted, by making raids, arrests, or passing license ordinances of such magnitude that a profit on the sale of any printed materials would be impossible. However, the people of this community will not tolerate further immoriality encourage ent--- especially where our youth are concerned. Therefore, we appeal to you to discontinue and cease stocking and selling any literature containing nude photo's, drawings, or other written obscenity. Otherwise, Headlines will have to be made.

Thanking you for your cooperation, compliance, and help in stamping out vice in Shelbyville.

Sincerely,

W.B. Porter
Mayor